Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Misc. No. 78-5419

GEORGE D. VAN CUREN,

Petitioner

-vs-

ARNOLD R. JAGO, SUPERINTENDENT,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF OF PETITIONER

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This Reply Brief, filed pursuant to Sup. Ct. R. 24(4), addresses four arguments first raised in Respondent's Response to Petition: (1) the degree to which a residuum of liberty is retained by a prisoner; (2) the role of Ohio's statute as an anchor for a due process interest; (3) the impact of review by this Court; and (4) the propriety of review on the factual record presented by this case.

PRELIMINARY STATEMENT

In his Petition for Certiorari, docketed September 19, 1978, Petitioner Van Curen sought review of the judgment and opinion, entered on June 21, 1978, of the United States Court on Appeals for the Sixth Circuit, which held that summary rescission of a grant of parole did not violate the constitutional guarantee of due process. A Supplemental Brief was filed by Petitioner on November 16, 1978, after this Court had granted certiorari in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, No. 78-201 (Oct. 3, 1978), on the issue of the due process ramifications of parole grants.

Four reasons for granting this petition have been asserted. First, the federal circuit courts of appeals, as well as district and state courts, are in conflict on the constitutional issue. Compare Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir.), cert. denied, 429 U.S. 917 (1976), with Franklin v. Shields, 569 F.2d 784, 800 (4th Cir.) (en banc), cert. denied, 435 U.S. 1003 (1978) (grants); McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975); with Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978) (rescissions).

Second, the issue is an important question on construction of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Language in Morrissey v. Brewer, 408 U.S. 471 (1972), Wolff v. McDonnell, 418 U.S. 539 (1974), and Meachum v. Fano, 427 U.S. 215 (1976), has fueled the conflict of lower courts on the issue; thus, this Court's guidance is necessary to avoid conflicting interpretation of the same constitutional provision as applied to a substantial interest: whether prisoners across the country are to have parole, their chance to be set free, considered by a fair procedure.

Third, Petitioner Van Curen had a constitutionally cognizable interest, arising both from the grievous loss he suffered by the summary rescission and subsequent denial of his grant of parole and by operation of Ohio's shock parole statute, O.R.C. §2967.31, as the parole board has customarily implemented the statute. That interest merited protection because Petitioner Van Curen had a justifiable expectation that compliance with statutory criteria would produce parole, and that once granted parole he would, in fact, be released. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Finally, this Court's grant of review in Greenholtz provides an opportunity, by granting this Petition, to resolve constitutional conflicts over both grants and rescissions of parole. Leaving the questions only half answered would disserve judicial economy by breeding more litigation and consequent petitions to this Court.

In response to these reasons for granting a writ of certiorari, Respondent asserts that prisoners lose their liberty upon incarcera-

tion. This Court has recognized, however, that some liberty interest is retained by the prisoner. Then, Respondent points to a difference in the Nebraska and Ohio statutes sub judice and suggests the difference distinguishes this Petition from Greenholtz. But, any difference in statute militates in favor of granting review in order to resolve totally, rather than in piecemeal fashion, the constitutional question. Moreover, the difference is not substantial: under both statutes, compliance with the enumerated criteria results in parole.

Respondent raises two arguments denigrating the importance of this case. Initially, Respondent submits so few rescissions have been made in Ohio that this case has little impact. Then, Respondent adds that the facts of this case make it unworthy of this Court's review. Yet, the impact of this case is nationwide, and the factual dispute is not dispositive of the due process issue; indeed, the dispute is indicative of why some process for fact finding was due.

For these and the reasons stated in the Petition and Supplemental Petition, Petitioner respectfully prays that this Court issue a writ of certiorari.

ARGUMENT

1. RESIDUUM OF LIBERTY

The Fourteenth Amendment to the Constitution of the United States provides that no state shall "deprive any person of life, liberty, or property, without due process of law." An inmate is no less a person, in constitutional terms, because of his or her incarceration. "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff, 418 U.S. at 555-56.

Respondent equates the physical control exercised by the state over a prisoner with the liberty protected by the Due Process Clause. Although this Court has held that the liberty interest is "sufficiently extinguished" to allow states to transfer prisoners without due process safeguards, Meachum, 427 U.S. at 224, prisoners have consistently been afforded other rights through the Due Process Clause. See, e.g., Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). Thus, "[r]escission of a parole release date, like prison disciplinary measures, impairs the 'residuum of liberty' of the prisoner..." Jackson v. Wise, 390 F. Supp. 19, 21 (C.D. Cal. 1975).

While certain rights and privileges may be curtailed incident to incarceration, denial of procedural safeguards in granting and rescinding parole is not a necessary concomitant of imprisonment. Respondent misplaces reliance on Price v. Johnston, 334 U.S. 266, 284-85 (1948), which involved a prisoner's asserted right to actually leave the prison and argue pro se an appeal. Unlike the restriction approved in Price, procedural safeguards do not directly affect the physical control of a prisoner; they do and should affect the length and conditions of that control.

2. STATUTORY ANCHOR

Respondent begins his discussion of Ohio's statutory provisions for parole by emphasizing that, under precedent decided before the "hands-off" doctrine succumbed in Morrissey and Wolff, no due process attached to grants and rescissions. That analysis avoids the central question: do the statutes themselves and their past implementation create an anchor for liberty or property interests.

To answer that question, Respondent attempts to distinguish the Nebraska statute before this Court in Greenholtz and the holding in Robinson. O.R.C. §2767.31 provides that shock parole may be granted when all the enumerated criteria apply; Neb. Rev. Stat. §83-1, 114 provides that parole must be granted unless any of the enumerated criteria apply. Greenholtz, 576 F.2d 1274, 1280 n.3 (8th Cir. 1978) (history omitted). The enumerated criteria

are quite similar, and the statutes' rationale of providing the parole board with legislative direction is identical.

Whatever substantive difference exists between the statutes is further cause for granting this Petition. In that way, the issues surrounding parole grants and rescissions can be settled in an efficient manner, not leaving for subsequent litigation any issue appropriate for resolution now.

Beyond that, though, the difference in the statutes is illusory. In Ohio, a canon of statutory construction is that utilization of the word "may" does not negate a statutory mandate. "Where the sense, purpose, or policy of a statute requires it, may as used in the statute will be construed as must or shall." State v. Board of Education, 127 Ohio St. 336, 339, 188 N.E. 556, 567 (1933). Under O.R.C. §2967.31, "may" is a term that permits release "[n]otwithstanding any other provision for determining parole eligibility." The thrust of the highly discretionary and encompassing enumerated criteria is that the parole board can, upon finding the criteria satisfied, release a prisoner. To suggest the parole board may find all the criteria satisfied and still deny parole is to render the legislative direction nugatory. The parole board could then act upon a totally arbitrary criterion, the color of an inmate's eyes, and still be faithful to the statute.

Moreover, the de facto implementation of the statute and the "mutual explicit understandings" between the parole board and the prisoner, as evidenced in the record, reflect a custom of granting parole without rescission. See Perry v. Sindermann, 408 U.S. 593, 601 (1972). As in Morrissey, implicit in the parole grant "is the notion that the parolee is entitled to retain his [grant of] liberty as long as he substantially abides by the conditions of his parole [grant]." 408 U.S. at 481-82. The process by which non-compliance with the criteria enumerated

in O.R.C. §2967.31 is determined and, for a rescission, redetermined must have procedural safeguards because the statute creates, like that in Wolff, interests conditioned on compliance with the criteria.

The grant to Petitioner Van Curen "established [a] right to conditional liberty at a specific future time." Kargler v. Sigler, 384 F. Supp. 10, 12 (D. Mass. 1974). That right should not have been rescinded absent a determination consistent with due process on compliance with the criteria in O.R.C. §2967.31. Both the initial grant and the rescission were based on those criteria and, at a minimum, the statutory "right to be considered eligible for release" is implicated. Bradford v. Weinstein, 519 F.2d 728, 730-31 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975). In addition, the right to receive parole is at stake because that is precisely the right the statute, as implemented, purports to grant upon compliance with its criteria.

The attempt Respondent makes to distinguish Robinson is likewise unavailing. That opinion first recognized the existence of a constitutional interest, then it surveyed the procedures provided. 570 F.2d at 922. The procedures surveyed were not relied upon to establish a right, nor should the absence of Ohio procedures negate the right. Instead, the statutory framework and de facto operation of the parole board create a constitutionally cognizable interest for which procedural safeguards must be provided.

3. IMPACT OF REVIEW

Because the number of rescissions in Ohio has been very limited, Respondent argues that this Petition does not present an important constitutional question. Interpretation of the Due Process Clause would, however, have an impact beyond Ohio's boundaries. The number of cases dealing with grants and rescissions reflects the need for judicial resolution of the

constitutional question, and limiting this Petition's impact to the historically few rescissions in Ohio is a patently invalid argument. Even if the Petition were so limited, the annual number of rescissions in Ohio amount to a case with impact beyond the single petitioner and upon an issue of utmost constitutional significance: the liberty of a prisoner.

4. FACTUAL UNDERPINNINGS

The final argument Respondent raises is that the facts of Petitioner Van Curen's rescission are so clear that procedural safeguards were unnecessary; so, this Petition is not free from "factual taint." Response to Petition at 7. Importantly, Petitioner Van Curen strenuously objects to the factual conclusions drawn by Respondent. It was precisely the apparent determination of such factual conclusions by the parole board in a summary fashion that deprived Petitioner of due process.

First, Petitioner could have shown that both a prison priest and psychologist advised him not to list his sponsor as a gay friend because the prison grapevine would then disseminate his homosexuality (Van Curen Dep. at 70, 89-90). He could have proven that the authorities, from police to prosecutor to sentencing judge, knew his sponsor was a former lover (Id. at 59), and that his family treated the sponsor as a relative (Id. at 58).

Second, no matter how offensive the facts, the right to procedural due process is guaranteed. This Court has struck down death penalties and convictions due to violation of fair trial rights where the factual underpinnings presented the most heinous offenses. Of course, the issue Petitioner presents is not whether the factual findings were correct; but rather, whether the manner - summarily, without due process - in which the findings were made comported with due process.

Finally, the underlying facts are not critical because procedural safeguards protect more than the fact finding process. Those safeguards provide a method by which the parole board should exercise its discretion, here on whether whatever Petitioner did justified rescinding his grant of parole. The opportunity to present mitigating evidence and argument was denied. As in Morrissey, the Petitioner should have had an opportunity not only to show "that he did not violate the conditions" of his parole grant but, even if he did, "that circumstances in mitigation suggest that the violation [did] not warrant" rescission. 408 U.S. at 488.

CONCLUSION

Review by this Court of the due process ramifications of parole grants and rescissions is necessary to quell the conflict across the country over what the Due Process Clause protects. For the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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